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Supreme Court of the United States

NO. 524—OCTOBER TERM, 1934.

AKTIESELSKABET "CUZCO" as owner of the Norwegian Steamship "TOLUMA",

Petitioner,

—against—

Steamship "SUCARSECO", her engines, boilers, etc., SUBMARINE BOAT CORPORATION,

Respondent,

(and two other cases).

WEST INDIA OIL COMPANY and J. H. SENIOR, AGENT, AMERICAN INSURANCE COMPANY *et al.*,

Respondents.

(Consolidated Cases.)

BRIEF IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI.

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West India Oil Company, and J. H. Senior, Agent, American Insurance Company et al.

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Supreme Court of the United States

No. 524—October Term, 1934.

Aktieselskabet "Cuzco", as owner of the Norwegian Steamship "Toluma",

Petitioner,

—against—

Steamship "Sucarseco", her engines, boilers, etc., Submarine Boat Corporation,

Respondent,

(and two other cases).

West India Oil Company and J. H. Senior, Agent, American Insurance Company *et al.*,

Respondents.

(Consolidated Cause.)

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

Statement.

This case presents a very simple issue which may be stated as follows:

> **Where cargo becomes liable to contribute in general average to losses and expenses incurred to minimize the damages resulting from a marine disaster, may the cargo owner recover the amount of this contribution as part of his damages, from one whose fault caused or contributed to the disaster?**

POINT I.

The law has been settled in accordance with the decision of the Circuit Court of Appeals both in this country and in England for many years.

In 1893 this question was considered and answered in the affirmative by Judge Addison Brown in one of those careful and scholarly opinions by which he contributed so much to the development of our admiralty law. *The Energia*, 61 Fed. 222. On appeal his decision was affirmed by the Circuit Court of Appeals for the Second Circuit, which quoted at length from his opinion, 66 Fed. 604.

The authority of the decision in *The Energia* has never been challenged. On the contrary, the case has been repeatedly cited both in this circuit and in other circuits; and the English courts have independently arrived at the same conclusion. *The Minnetonka* (1905), Prob. Div. 206. (See C. C. A. opinion below, R., p. 83.)

The petitioner, while apparently accepting the *Energia* decision, seeks to distinguish the present case on the ground that no general average would have been payable here if the relation of the parties under the general maritime law had not been modified by the contract of affreightment. This distinction fails because the same thing was true in the case of the *Energia*. In that case the general average was governed by British law, which obtained at the port of destination; but even under British law a vessel which is legally responsible for the disaster cannot recover a general average contribution from cargo. The contribution was due under British law only because the bill of lading contained a clause (valid under that law) exempting the carrier from liability for the negligence of his servants. *The Carron Park* (1890), Prob. Div. 203. Hence, it was no more true in the case of the *Energia* than in the present case, that the liability for general average arose under the

general maritime law, apart from the contract of transportation. Indeed, it is impossible to discuss general average apart from contract; for there is always a contract of transportation, express or implied.

POINT II.

Respondent's damages (to "Toluma" cargo) arise from the collision and not from the contract of affreightment. The Jason Clause merely provides a method for apportioning reasonably between the vessel ("Toluma") and her cargo, the expenses necessarily incurred to avert or minimize the peril to which both cargo and vessel were exposed by the collision.

Petitioner urges that the damage sustained by the cargo owners arose from a contract between them and the "Toluma"; and, hence, as to a third party, the "Sucarseco", these damages are remote and not legally recoverable. It is worthy of note that this argument is not made by the third party ("Sucarseco"), but by the "Toluma", which was a party to the contract, and which now seeks to shield itself behind an objection of remoteness which, if it existed, would more properly be raised by the "Sucarseco". This anomaly, however, is relatively unimportant. A complete answer to the petitioner's argument is found in the fact that the loss sustained by the cargo owners was not caused by their contract with the "Toluma", but by the collision between that vessel and the "Sucarseco". It is stipulated and agreed that all of the expenses involved in this litigation were caused by the collision (R. 47) and were general average expenses (R. 50-51); *i. e.*, expenses incurred to save both the "Toluma" and her cargo from greater loss resulting from the collision. The Jason Clause in the "Toluma" bill of lading did nothing more than authorize the master to act promptly and effectively, on be-

half of cargo as well as hull, in the event of disaster, *i. e.*, it was an agreement by cargo to bear its share of expenses and losses incurred by the master for the purpose of minimizing the damages. Cargo's general average contributions were, of course, merely its share of such losses and expenses.

If the cargo owners themselves had been present and had incurred necessary expenses for the preservation of their cargo, their right to recover such expenses could scarcely be disputed. The same would be true if the master, after disaster, had communicated with them and asked their authority to incur necessary expenses on their behalf to save the cargo. By the Jason Clause, in order to avoid delay (which in a case of marine disaster may often be fatal) the cargo owners authorize the master, in advance, to incur necessary expenses for their account when their property is in danger, without regard to any previous negligence on the part of the ship. Why the giving of such authority in advance should alter the legal situation as against a third party, is difficult to understand. The petitioner apparently would not dispute the cargo owner's right to recover salvage which he was forced to pay to an independent salvor who intervened and acquired a lien on the cargo, for services rendered in saving it from peril after the collision. It claims, however, that because the cargo owner authorized the master of the vessel (obviously the person best situated to act for all interests) in advance to incur expense for cargo's account,—the expense so incurred is not recoverable. This argument is wholly unsupported either by logic or by legal authority.

The petitioner cites *Flint* v. *Robins*, 275 U. S. 303, and similar cases, as authority for the proposition that the owners of cargo on the "Toluma" can have no claim against the "Sucarseco". These cases have no bearing whatever on the present case. The claim of the cargo owners is not

based on a tort committed against the "Toluma", but on a tort committed against their own property. The collision endangered not only the "Toluma" but also her cargo; and the expenses in question (*ex hypothesi,* since it is admitted that they were properly allowable in general average) were necessary to save both vessel and cargo from greater loss. The present is a case, therefore, where the cargo owners sued to recover expenses which they had necessarily and properly incurred to save their own property from a peril to which it was physically exposed by the tortious act of a third party. If the petitioner's argument were accepted with respect to such expenses, it might be argued with equal force that the petitioner could not recover any part of the "Toluma" hull damage from the "Sucarseco", because the loss arose not from the collision, but from the contract which the petitioner made with the shipyard to repair the damage.

Petitioner argues that the cargo owners need not have accepted a bill of lading containing the Jason Clause; and in that event they need not have paid the expenses in question, and that the shipowner was legally obligated in any event to incur the general average expenses in order to deliver the cargo, or respond in damages* (Petitioner's Brief, Point I, p. 12). As we shall point out, *this contention is directly contrary to the ruling of this Court in the Jason,* 225 U. S. 32, 54.

Possibly, in the absence of a Jason Clause, the cargo owners would not have been bound to contribute to expenses incurred by the master even though such expenses were of a general average nature; but neither would the master have been bound to incur them. If he had not done so (it being agreed that the expenses were properly and

* In the event of a marine peril preventing the completion of the voyage, the shipowner is protected from liability by the provisions of the Harter Act. U. S. Code, Title 46, Ch. 8, §192, printed Appendix hereto, page 11. Consequently the only purpose of expenditures on his part (independently of cargo) would be to complete the voyage and earn the freight.

necessarily incurred to avoid greater loss), it is apparent that the cargo would have been lost or more seriously damaged, and the cargo owners would have had a larger claim against the "Sucarseco", the validity of which could not have been questioned.

In the case of *The Irrawaddy*, 171 U. S. 187, this Court held that although under the Harter Act* negligence in navigation no longer rendered a shipowner liable for damage to cargo, nevertheless such negligence was still a bar to any claim made by the shipowner against the cargo for contribution to general average sacrifices. If the matter had rested there, some support might exist for the petitioner's argument, which seems to be that if the cargo owners had refused to accept the Jason Clause the master would have been bound to incur general average losses and sacrifices for the benefit of the cargo, without hope of reimbursement. This precise argument, however, was made and rejected in this Court in the very case from which the *Jason Clause* takes its name. In the case of *The Jason*, 225 U. S. 32, 54, this Court said:

> "But it is further insisted that the duty of the master to save the imperiled property extends so far as to call for a sacrifice of a part of the owner's property if necessary to save the cargo. In our opinion the master's duty as agent of the owner is not so extensive. If it were, there would be an end at once of all contribution in general average for ship's sacrifices, for such sacrifices could not be deemed voluntary and extraordinary, if made in performance of the owner's general duty to his cargo."

As already pointed out, the major premise of petitioner's argument (Petitioner's Brief, Point I, p. 12) is untenable in the light of this decision.

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* Act of February 13, 1893, U. S. Code, Title 46, Ch. 8, §192, printed Appendix hereto, page 11.

From the foregoing it is apparent that as a result of the decision in *The Irrawaddy, supra,* some agreement such as the *Jason Clause* was essential to avoid a serious impasse in the case of every marine disaster which was, or might be, attributable to negligence in navigation. The shipowner was not liable for damage to the cargo; but, on the other hand, he was not bound to incur general average sacrifices or expenses for account of the cargo. The *Jason Clause* afforded a way out of this dilemma by giving the master authority, notwithstanding any previous negligence in navigation, to incur general average expenses for the direct account of the cargo. It may well be that the master would have this authority even without the *Jason Clause.* The actual decision in *The Irrawaddy* related only to physical sacrifices of the shipowner's property, and did not deal with the master's authority to bind cargo for its share of any expenditures which might become necessary for the common safety in a port of refuge. But whether the master had this authority or not, it was eminently desirable that he should have it; and any doubt on the subject was resolved by the *Jason Clause.* Under that clause the master has authority as the cargo owner's representative to incur whatever expenses may be necessary to save cargo from impending peril. Reason requires, and the Circuit Court of Appeals has held, that expenses so incurred by the master are recoverable from a third party *tort feasor* in the same manner as expenses incurred by the cargo owner himself or by an independent salvor. So long as the rule for division of the expenses incurred to minimize the loss, as between the vessel owner and the cargo interest, is reasonable, the third party tort feasor cannot complain, *The Minnetonka* (1905), Prob. Div. 206, 215, 216. The shipowner (petitioner here), who is a party to the contract, is, of course, in no position to assert that the division is unreasonable.

Much of the petitioner's argument has to do with the apportionment of damages between the two vessels, in determining the ultimate single liability pursuant to the rule laid down by this Court in the case of *The Chattahoochee,* 173 U. S. 540. It is suggested that the liability of the "Sucarseco" to the "Toluma" cargo is affected in some way by the fact that half of the recovery by cargo can be offset by the "Sucarseco" against the claim of the "Toluma". We submit that all of this discussion is entirely irrelevant. The liability of the "Sucarseco" to the cargo of the "Toluma" is not dependent upon and cannot be affected by the principles which govern the adjustment of damages as between the "Sucarseco" and the "Toluma". These rules of adjustment do not come into play until the liability of the "Sucarseco" has been established; they have no bearing on the liability but only govern the final apportionment of damages between the two vessels. Such was the decision of this Court in *The Chattahoochee, supra.*

POINT III.

The decision of the District Court was based upon errors which are readily apparent in its opinion.

The suggestion that the decision which this Court is asked to review involves any novel principle is, we submit, entirely without foundation. The Circuit Court of Appeals merely adhered to a principle which has been well settled both in this country and in England for more than a generation. The only novel feature of the present case was the decision of the District Court, which was reversed by the Circuit Court of Appeals. The decision of the District Court was based on a misapprehension which is quite apparent from a reading of its opinion. This misapprehen-

sion is well illustrated by the following passage from the opinion (R., p. 62):

> "Where the damage to hull is caused solely by the fault of a stranger, the primary liability to make the loss good is on the stranger, and the liability of the cargo owner to the ship owner in general average is no more than secondary."

If the cargo owners had contributed to the "damage to hull" of the "Toluma", as suggested in the above quotation, there would be great force in the argument that such a contribution was a private matter between the hull and cargo of the "Toluma", with which the "Sucarseco" was not concerned. Such damage, however, or any other damage directly caused by the collision is, of course, not the subject of general average contribution. Contribution in general average is due not in respect of any damage sustained either by hull or cargo in the collision; but is due only in respect of sacrifices or expenses *voluntarily* incurred by the master, as the representative of all interests, *after the collision has occurred and for the sole purpose of averting further loss. Ralli* v. *Troop,* 157 U. S. 386, 406, 409; *Burton* v. *English* (1883), 12 Q. B. D. 218, 223. It is apparent, therefore, that the opinion of the District Court rested on a false premise.

The decision of the District Court was also influenced by the fact that the court misinterpreted certain language used obiter in a recent decision of the Circuit Court of Appeals, *Pool Shipping Co.* v. *U. S.,* 33 F. (2d) 275 (C. C. A. 2), and gave an erroneous significance to an earlier decision of the District Court, *Ralli* v. *Societa Anonima, etc.,* 222 Fed. 994 (D. C. N. Y.). This is pointed out in the opinion of the Circuit Court of Appeals (R., p. 85).

In the *Ralli* case the collision suit had been tried in England where, contrary to the American rule, cargo's

recovery from the non-carrying vessel is only proportional to the fault of the latter. Hence, the carrying vessel had recovered all that cargo could have recovered in a direct suit against the non-carrying vessel, *i. e.*, one-half; and the owner of the carrying vessel, naturally enough, was only asked and required to account for what he had actually recovered. That decision has no possible bearing on the present case.

The opinion of the Circuit Court of Appeals discusses the case so clearly and comprehensively that we deem it unnecessary to elaborate our argument. The principles involved are well settled and there is no suggestion of any conflict between the circuits. The petitioner's argument never had any foundation except in some collateral remarks made by the Circuit Court of Appeals for the Second Circuit in deciding the *Pool Shipping Company* case, *supra*. That court has now corrected any misunderstanding of its language, saying (R., p. 85):

> "The idea that the liability of the noncarrying ship, when at fault for a collision, to cargo on the carrying ship, is secondary, may be due in part at least to some reference to the position of cargo as that of a surety or insurer in *Pool Shipping Company* v. *United States* (C. C. A.) 33 F. (2d) 275, where the right of the carrying ship to recover as bailee of the cargo was sustained, but that language is not to be torn from its context and given general application."

POINT IV.

The argument on the issues in this case contained in the brief for respondent in No. 525 is irrelevant and is contradicted by the record in that case.

Through different members of the same firm, the lawyers who represent the petitioner in the present case repre-

sent also the respondent in *New York & Cuba Mail Steamship Co.* v. *American Steamship Owners Mutual Protection & Indemnity Association,* No. 525 on the calendar of this Court. They have adopted the novel procedure of devoting most of their argument in No. 525 to the point presented in the present case, although that question did not arise under the decision of the Circuit Court of Appeals in No. 525. While we consider that the argument referred to is wholly irrelevant in No. 525, there is one feature of that case to which we feel we should call attention. Counsel for the respondent in that case argue that the decision of the Circuit Court of Appeals in the present case is contrary to the settled practice in similar cases. So far from supporting this assertion, the record in No. 525 contains the most persuasive evidence to the contrary. It appears from the record in that case that the adjusters who distributed the proceeds of the recovery made by the New York & Cuba Mail Steamship Co. from the Steamship "Hamilton", followed the precise rule laid down by the Circuit Court of Appeals in the present case, *i. e.*, they paid over to cargo interests the full amount of their damages, which consisted almost entirely of general average contributions (Petition in No. 525, p. 2; Record in No. 525, pp. 20 to 23). Accordingly, as against the unsupported statement of counsel for the respondent in No. 525, we have (as the only evidence on the subject) the actual practice of an experienced firm of average adjusters.

CONCLUSION.

We respectfully submit that the petition should be denied.

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Appendix.

HARTER ACT.

If the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service.

U. S. Code, Title 46, Ch. 8, §192.